

Jul 02, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALLAN M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:17-CV-05147-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 14, 16. Attorney D. James Tree represents Allan M. (Plaintiff); Special Assistant United States Attorney Michael Sinclair Howard represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on May 20, 2013 and March 12, 2013 respectively, Tr. 81-82, alleging disability since December 31, 2011, Tr. 158, 165,

1 due to back problems, testicular problems, a crushed chest, and masses, Tr. 186.
2 The applications were denied initially and upon reconsideration. Tr. 124-27, 129-
3 31.¹ Administrative Law Judge (ALJ) Larry Kennedy held a hearing on July 15,
4 2015 and heard testimony from Plaintiff and vocational expert Daniel McKinny.
5 Tr. 41-80. Plaintiff was unrepresented at the hearing. Tr. 44-49, 155. The ALJ
6 issued an unfavorable decision on April 18, 2016. Tr. 23-35. The Appeals
7 Council denied review on July 26, 2017. Tr. 1-6. The ALJ's April 18, 2016
8 decision became the final decision of the Commissioner, which is appealable to the
9 district court pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this action
10 for judicial review on March 28, 2017. ECF Nos. 1, 4.

11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized
14 here.

15 Plaintiff was 45 years old at the alleged date of onset. Tr. 158. He attended
16 special education classes in school and completed the eleventh grade in 1984. Tr.

17
18 ¹The record contains a denial of both SSI and DIB claims following the
19 initial application. Tr. 124-27. However, the record only contains a denial of the
20 SSI request for reconsideration. Tr. 129-31. The ALJ's decision addresses the
21 DIB application, stating that it too was denied at reconsideration. Tr. 23. Without
22 the DIB reconsideration denial in the record, it is unclear if the ALJ had
23 jurisdiction under 20 C.F.R. § 404.930 to consider the DIB claim. Plaintiff fails
24 the challenge the ALJ's jurisdiction. ECF No. 14. This Court will consider the
25 claim as if the ALJ did have jurisdiction to consider the DIB claim. However,
26 upon remand, the ALJ will supplement the record with the reconsideration denial
27 of the DIB claim, or if no denial has occurred, he will refer the DIB claim back to
28 the appropriate State agency to make a reconsideration determination.

1 187. His reported work history includes the jobs of roofer and painter. *Id.*
2 Plaintiff reported that he stopped working on December 31, 2011 due to his
3 conditions. Tr. 186.

4 **STANDARD OF REVIEW**

5 The ALJ is responsible for determining credibility, resolving conflicts in
6 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
7 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
8 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
9 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
10 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
11 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
12 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
13 another way, substantial evidence is such relevant evidence as a reasonable mind
14 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
15 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
16 interpretation, the court may not substitute its judgment for that of the ALJ.
17 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
18 findings, or if conflicting evidence supports a finding of either disability or non-
19 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
20 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
21 evidence will be set aside if the proper legal standards were not applied in
22 weighing the evidence and making the decision. *Browner v. Secretary of Health*
23 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

24 **SEQUENTIAL EVALUATION PROCESS**

25 The Commissioner has established a five-step sequential evaluation process
26 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
27 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
28 through four, the burden of proof rests upon the claimant to establish a prima facie

1 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
2 burden is met once the claimant establishes that physical or mental impairments
3 prevent him from engaging in his previous occupations. 20 C.F.R. §§
4 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,
5 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
6 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
7 which the claimant can perform exist in the national economy. *Batson v. Comm’r*
8 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant
9 cannot make an adjustment to other work in the national economy, a finding of
10 “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

11 ADMINISTRATIVE DECISION

12 On April 18, 2016, the ALJ issued a decision finding Plaintiff was not
13 disabled as defined in the Social Security Act.

14 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
15 activity since December 31, 2011, the alleged date of onset. Tr. 25.

16 At step two, the ALJ determined Plaintiff had the following severe
17 impairments: lumbar spine degenerative disc disease; mood disorder vs.
18 depressive disorder; learning disorder; anxiety disorder; personality disorder; and
19 substance abuse disorder. Tr. 25.

20 At step three, the ALJ found Plaintiff did not have an impairment or
21 combination of impairments that met or medically equaled the severity of one of
22 the listed impairments. Tr. 27.

23 At step four, the ALJ assessed Plaintiff’s residual function capacity and
24 determined he could perform a full range of light work with the following
25 limitations:

26 The claimant can occasionally balance, stoop, kneel, and crouch. He
27 cannot climb or crawl. The claimant can perform simple, routine tasks
28 and follow short, simple instructions. The claimant can do work that

1 needs little or no judgment and can perform simple duties that can be
2 learned on the job in a short period.

3 Tr. 29. The ALJ identified Plaintiff's past relevant work as construction worker I
4 and roofer and concluded that Plaintiff was not able to perform this past relevant
5 work. Tr. 34.

6 At step five, the ALJ determined that, considering Plaintiff's age, education,
7 work experience and residual functional capacity, there were other jobs that exist
8 in significant numbers in the national economy Plaintiff could perform. Tr. 34-35.
9 The ALJ made this determination using the Medical-Vocational Rule 202.18. *Id.*
10 The ALJ concluded Plaintiff was not under a disability within the meaning of the
11 Social Security Act at any time from December 31, 2011, through the date of the
12 ALJ's decision. Tr. 35.

13 ISSUES

14 The question presented is whether substantial evidence supports the ALJ's
15 decision denying benefits and, if so, whether that decision is based on proper legal
16 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
17 opinion evidence, (2) failing to make a proper step two determination, (3) failing to
18 develop the record, and (4) failing to properly address Plaintiff's symptom
19 statements.

20 DISCUSSION

21 1. Opinion Evidence

22 Plaintiff argues the ALJ failed to properly consider and weigh the medical
23 opinions expressed by Tae-Im Moon, Ph.D., Jan Kouzes, Ed.D., Jason Roberts,
24 ARNP, and Candice Webb, M.S., M.H.P. ECF No. 14 at 10-18.

25 In weighing medical source opinions, the ALJ should distinguish between
26 three different types of physicians: (1) treating physicians, who actually treat the
27 claimant; (2) examining physicians, who examine but do not treat the claimant;
28

1 and, (3) nonexamining physicians who neither treat nor examine the claimant.
2 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
3 weight to the opinion of a treating physician than to the opinion of an examining
4 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
5 should give more weight to the opinion of an examining physician than to the
6 opinion of a nonexamining physician. *Id.*

7 When a treating physician's opinion is not contradicted by another
8 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
9 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
10 physician's opinion is contradicted by another physician, the ALJ is only required
11 to provide "specific and legitimate reasons" for rejecting the opinion. *Murray v.*
12 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when an examining
13 physician's opinion is not contradicted by another physician, the ALJ may reject
14 the opinion only for "clear and convincing" reasons, and when an examining
15 physician's opinion is contradicted by another physician, the ALJ is only required
16 to provide "specific and legitimate reasons" to reject the opinion. *Lester*, 81 F.3d
17 at 830-31.

18 The specific and legitimate standard can be met by the ALJ setting out a
19 detailed and thorough summary of the facts and conflicting clinical evidence,
20 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
21 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer his
22 conclusions, he "must set forth his interpretations and explain why they, rather
23 than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.
24 1988).

25 When addressing opinions from medical providers, who are not considered
26 acceptable medical sources, *see* 20 C.F.R. §§ 404.1502(a), 416.902(a) (defining
27 acceptable medical sources), the ALJ can only reject their opinions by providing
28 reasons germane to each provider. *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th

1 Cir. 2014); *see also* 20 C.F.R. §§ 404.1527(f), 416.927(f) (requiring an ALJ to
2 address opinions from non-acceptable medical sources).

3 **A. Tae-Im Moon, Ph.D.**

4 Dr. Moon examined Plaintiff for the Washington Department of Social and
5 Health Services (DSHS) on three separate occasions. In the first, dated August 1,
6 2012, Dr. Moon diagnosed Plaintiff with major depressive disorder recurrent with
7 psychotic features, rule out bipolar disorder, anxiety disorder, cannabis abuse,
8 learning disorder not otherwise specified by history, and personality disorder. Tr.
9 257. Dr. Moon opined that Plaintiff had a marked limitation in six basic work
10 activities and moderate limitations in four additional basic work activities. Tr. 258.
11 The ALJ gave this opinion little to no weight because it was inconsistent with Dr.
12 Moon's examination and it was inconsistent with the two subsequent evaluations
13 Dr. Moon performed at the request of DSHS. Tr. 32-33. As a psychologist, Dr.
14 Moon is an acceptable medical source. 20 C.F.R. §§ 404.1502(a)(7),
15 416.905(a)(7).

16 The ALJ's first reason for rejecting the opinion, that it was inconsistent with
17 Dr. Moon's examination, is not supported by substantial evidence. The ALJ stated
18 that "the examination found only deficits in fund of knowledge." Tr. 32.
19 However, the examination showed that Plaintiff appeared unkempt, his speech was
20 rambling, his mood was anxious/fearful, his affect was anxious, and his fund of
21 knowledge was not within normal limits. Tr. 259-60. While Plaintiff's orientation
22 was found to be within normal limits, Dr. Moon stated that Plaintiff "[d]idn't know
23 the 8th month was called August." Tr. 260. Additionally, his concentration was
24 found to be within normal limits, yet he could not spell world backwards and he
25 forgot the second step of his three step instruction. Tr. 260. Therefore, while Dr.
26 Moon's findings were within normal limits, it does not mean Plaintiff's
27 examination was free of error. This does not support the ALJ's finding that the
28 only deficits were in fund of knowledge.

1 The ALJ's second reason for rejecting the opinion, that it was inconsistent
2 with the two subsequent opinions from Dr. Moon, is not specific and legitimate.
3 Inconsistency with the majority of objective evidence, including other opinions, is
4 a specific and legitimate reason for rejecting a physician's opinion. *Batson*, 359
5 F.3d at 1195. However, here, the ALJ erred in his treatment of Dr. Moon's two
6 subsequent opinions and his practice of assigning a "moderate limitation" a
7 meaning equivalent to "no limitation." *See infra*. Therefore, the ALJ is to
8 readdress Dr. Moon's August 1, 2012 opinion when he readdresses Dr. Moon's
9 other opinions upon remand.

10 Dr. Moon completed a second evaluation for DSHS on July 15, 2013. Tr.
11 307-11. Dr. Moon diagnosed Plaintiff with learning disorder not otherwise
12 specified by history and a rule out diagnosis of mood disorder not otherwise
13 specified. Tr. 308. Dr. Moon stated that "[t]here is an element of grandiosity and
14 impulsivity in his presentation." Tr. 307. Dr. Moon opined that Plaintiff had a
15 marked limitation in the ability to be aware of normal hazards and take appropriate
16 precautions and a moderate limitation in an additional eleven basic work activities,
17 including in areas of persistence and social functioning. Tr. 309. The ALJ gave
18 the opinion some weight stating, "[T]his assessment is more consistent with the
19 claimant's treatment records and his performance during mental status
20 examination, which shows that his concentration, memory, and social functioning
21 are generally intact, with some difficulties with labile affect and tearful
22 presentation." Tr. 33.

23 Plaintiff challenges the ALJ's treatment of this opinion by asserting that he
24 failed to account for the opined limitations in Plaintiff's residual functional
25 capacity determination, arguing that even moderate limitation in the areas opined
26 would result in an inability to sustain competitive employment. ECF No. 14 at 14-
27 16. Plaintiff refers to Social Security Ruling (S.S.R.) 85-15 in his argument,
28 asserting that a reliance on the ruling would lead to a finding of disabled. *Id.* at 14.

1 However, the Ninth Circuit has found that S.S.R. 85-15 does not apply to cases in
2 which both exertional and nonexertional impairments are at issue. *Roberts v.*
3 *Shalala*, 66 F.3d 179, 183 (9th Cir. 1995). Since Plaintiff's alleged impairments
4 include exertional impairments, such as back pain, S.S.R. 85-15 does not apply.

5 Despite Plaintiff's mislaid reliance on S.S.R. 85-15, he accurately points out
6 that the ALJ's residual functional capacity determination failed to account for the
7 moderate limitations supplied in the July 15, 2013 opinion, effectively rejecting a
8 portion of the opinion without explanation. The residual functional capacity
9 assessment "must always consider and address medical source opinions. If the
10 [residual functional capacity] assessment conflicts with an opinion from a medical
11 source, the adjudicator must explain why the opinion was not adopted." S.S.R. 96-
12 8p. Here, Dr. Moon opined moderate limitations, defined as "significant limits on
13 the ability to perform one or more basic work activity," in the abilities to perform
14 activities within a schedule, maintain regular attendance, and be punctual within
15 customary tolerances without specified limitations, to communicate and perform
16 effectively in a work setting, to complete a normal work day and workweek
17 without interruptions from psychologically based symptoms, and to maintain
18 appropriate behavior in a work setting. Tr. 309. These limitations are absent from
19 the ALJ's residual functional capacity determination. Tr. 29. Defendant argues
20 that these limitations were addressed in the ALJ's decision and the residual
21 functional capacity determination represents the ALJ's translation of medical
22 opinions into a residual functional capacity assessment. ECF No. 16 at 8-9.
23 Defendant is effectively asserting that a "moderate limitation" is synonymous with
24 "no limitation."

25 Despite Defendant's argument, the Court finds that the ALJ's translation of
26 Dr. Moon's opined "moderate limitation" to "no limitation" not supported in the
27 record. The form included the option of "None or Mild." Tr. 309. Therefore, had
28 Dr. Moon found a lack of limitation resulting from Plaintiff's mental impairments,

1 the psychologist would have checked the “None or Mild” box, not the “Moderate”
2 box. As such, the limitations were rejected without comment by the ALJ, which is
3 an error. Therefore, this case is remanded for the ALJ to properly address Dr.
4 Moon’s July 15, 2013 opinion.

5 Dr. Moon completed a third evaluation for DSHS on June 9, 2015. Tr. 631-
6 36. Dr. Moon diagnosed Plaintiff with an unspecified depressive disorder and
7 specific learning disorder with impairments in reading, writing expression, and
8 mathematics by history. Tr. 633. When discussing the depression diagnosis, Dr.
9 Moon stated that the “depression appears to be in a state of partial remission with
10 antidepressant medication. He continues to have problems with sleeping,
11 maintaining focus and making decision [sic] which would interfere with his ability
12 to work reliably.” *Id.* Dr. Moon opined that Plaintiff had moderate limitations in
13 twelve out of the thirteen basic work activities addressed on the form. Tr. 633-34.
14 The psychologist rated the overall severity based on the combined impact of all
15 diagnosed mental impairments to be moderate. Tr. 634. A moderate limitation
16 “means there are significant limits on the ability to perform one or more basic
17 work activity.” Tr. 633. The ALJ gave the opinion some weight, finding it
18 “consistent with the mental status examination that was within normal limits.” Tr.
19 33. However, the ALJ did “not adopt his finding that the claimant’s symptoms
20 ‘would interfere with his ability to work reliably,’ as this is inconsistent with
21 moderate functional limitations and the claimant’s performance during mental
22 status examination.” *Id.*

23 Again, the ALJ’s determination that “moderate limitations” equates to “no
24 limitations” is not supported by substantial evidence. *See supra.* The form Dr.
25 Moon completed included a rating of “None to Mild.” Tr. 633. If Dr. Moon was
26 of the opinion that Plaintiff’s impairments did not interfere with his ability to work,
27 the psychologist would have indicated so by checking the box “None to Mild,” and
28 not “Moderate.” As such, the case is remanded for the ALJ to further address Dr.

1 Moon's June 2015 opinion.

2 **B. Jan Kouzes, Ed.D.**

3 On January 23, 2012, Dr. Kouze completed an evaluation of Plaintiff at the
4 request of DSHS. Tr. 303-06. She diagnosed Plaintiff with panic disorder without
5 agoraphobia, major depressive disorder, and cannabis abuse. Tr. 303. When asked
6 what Plaintiff was capable of doing despite his mental health impairments, Dr.
7 Kouzes asked Plaintiff three questions and quoted his responses. Tr. 305. The
8 ALJ gave Dr. Kouzes' mental evaluation little weight because he did not provide a
9 residual functional capacity statement, but "instead merely restating the claimant's
10 reports regarding his activities." Tr. 33.

11 The ALJ's conclusion, that Dr. Kouzes failed to provide a residual
12 functional capacity assessment, is supported by the record. Dr. Kouzes asked three
13 questions: "How do you like to spend your spare time?"; "What are your
14 hobbies?"; and "What can you still do?" Tr. 305. He then quoted Plaintiff's
15 responses: "I like to watch tv, I think and I tinker."; "I like to make little gadgets
16 or toys."; and "I don't do much. I take care of myself. I watch tv, I like to go to
17 the casino. I try to do odd jobs to make a little money. I watch tv. I like to
18 tinker." *Id.* This is not a residual functional capacity assessment. However, this
19 does not negate the observations Dr. Kouzes made in his Mental Status Exam. Tr.
20 305-06. Therefore, upon remand the ALJ will still consider Dr. Kouzes'
21 observations throughout the five step sequential evaluation.

22 **C. Jason Roberts, ARNP**

23 Nurse Roberts was Plaintiff's treating provider beginning in July 2014. Tr.
24 557. On June 2, 2015, Nurse Roberts completed a Physical Functional Evaluation
25 form for DSHS. Tr. 622-30. He stated that Plaintiff's diagnoses were back pain,
26 lipoma, psychosis, depression, and erectile dysfunction. Tr. 623. He stated that
27 Plaintiff's back pain resulted in mild limitations in sitting, standing, walking
28 lifting, carrying, handling, pushing, pulling, reaching, stooping, and crouching. *Id.*

1 He stated that Plaintiff's psychosis resulted in a marked² to severe³ limitation in
2 communicating. *Id.* He opined that Plaintiff could perform light work in a regular
3 predictable manner and that the limitation was "lifelong" with available medical
4 treatment. Tr. 624. The ALJ addressed Mr. Roberts' opinion as follows:

5 Some weight is given to the June 2015 evaluation by Jason Roberts,
6 A.R.N.P. (Ex. 21F). Mr. Roberts opined that the claimant can perform
7 light work, citing examination findings mild lumbar spine range of
8 motion limitations but intact strength, reflexes, and sensory
9 functioning. This functional assessment is consistent with the record
10 as whole and his clinical observations. While Mr. Roberts is not an
11 acceptable medical source, I note that he has treated the claimant, and
his opinions are supported by objective findings. He opined that the
claimant's physical conditions cause mild to no limitations.

12
13 Tr. 32. Here, the ALJ failed to address Nurse Roberts' statement regarding
14 Plaintiff's diagnosis of psychosis. Additionally, the residual functional capacity
15 determination fails to address any deficits in Plaintiff's ability to communicate. Tr.
16 29. Therefore, the ALJ rejected this portion of Nurse Roberts' opinion without
17 comment.

18 This is error under S.S.R. 96-8p. (The residual functional capacity
19 assessment "must always consider and address medical source opinions. If the
20 [residual functional capacity] assessment conflicts with an opinion from a medical
21 source, the adjudicator must explain why the opinion was not adopted."). While
22 Nurse Roberts' opinion does not qualify as a medical source opinion because he is
23 not an acceptable medical source, 20 C.F.R. §§ 404.1527(a), 416.927(a), the ALJ's
24 failure to address the opined limitations in Plaintiff's ability to communicate due to

25 ²A marked limitation is defined as a "[v]ery significant interference with the
26 ability to perform one or more basic work-related activities." Tr. 623.

27 ³A severe limitation is defined as an "[in]ability to perform one or more
28 basic work-related activities." Tr. 623.

1 his psychosis was an error. This was Plaintiff's most limiting impairment
2 according to Nurse Roberts. Tr. 623. During the physical examination, the only
3 abnormal observation by Nurse Roberts was regarding Plaintiff's psychological
4 state. Tr. 629. Nurse Roberts stated that Plaintiff appeared anxious and that he
5 had an inappropriate mood and affect described as expansive, flight of ideas,
6 forgetful, and grandiosity. *Id.* As such, the ALJ will readdress Nurse Roberts'
7 opinion regarding Plaintiff's ability to communicate upon remand.

8 **D. Candice Webb, M.S., M.H.P**

9 Ms. Webb completed an evaluation for DSHS on June 6, 2012. Tr. 267-70.
10 She listed his diagnoses as major depressive disorder, anxiety disorder, cannabis
11 abuse, borderline personality traits, and rule out borderline personality disorder.
12 Tr. 267. When asked about the effect of Plaintiff's symptoms on his ability to
13 work, Ms. Webb stated the following, including quotes from Plaintiff:

14 "Can't remember what I was supposed to do and can't stay focused".
15 Feels that his depression turns to anger at work because he can't stand
16 'stupid people'. Will stress out easily. His depression makes it difficult
17 to stay on task and concentrate on the task at hand. He has difficulties
18 understanding simple questions asked of him or filling out any type of
19 questionnaire or handout. He would not be able to read
20 policies/procedures of the company he works for. He is unable to write
21 complete sentences or spell words correctly. He would not be able to
22 keep a job that required any writing, use of a computer, math skills, etc.
23 Having delusional thinking that he is a psychic and that he has an
24 'influence' on the people he is around may impair his relationships with
25 co-workers and customers.

26 Tr. 268-69. When asked about his residual capacity, Ms. Webb quoted Plaintiff as
27 stating "It seems like I've been too busy with appointments to do things that I
28 enjoy doing." Tr. 269. The ALJ gave the evaluation little weight because Ms.
Webb did not provide a residual functional capacity assessment, but simply quoted
Plaintiff's statements and because it was inconsistent with the more recent

evidence and opinions showing improvement in Plaintiff's condition and partial remission of the depression. Tr. 33.

Considering this case is being remanded for the ALJ to address other opinions concerning Plaintiff's mental health impairments and their resulting limitations, the ALJ is instructed to readdress Ms. Webb's DSHS evaluation.

2. Step Two

Plaintiff challenges the ALJ's step two determination arguing that he erred by failing to find his psychosis a severe impairment. ECF No. 14 at 6-10.

The step-two analysis is "a de minimis screening device used to dispose of groundless claims." *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An impairment is "not severe" if it does not "significantly limit" the ability to conduct "basic work activities." 20 C.F.R. §§ 404.1522(a), 416.922(a). Basic work activities are "abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 416.922(b). "An impairment or combination of impairments can be found not severe only if the evidence establishes a slight abnormality that has no more than a minimal effect on an individual's ability to work." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (internal quotation marks omitted).

The ALJ found Plaintiff's psychosis to be a nonsevere impairment, finding that Plaintiff's "psychotic symptoms are transient in nature and do not consistently cause more than minimal functional limitations." Tr. 26. Plaintiff argues that if Nurse Roberts' opinion regarding the functional effect to these limitations were properly credited, psychosis would be a severe impairment. ECF No. 14 at 10-11. Considering the ALJ has been instructed to readdress Nurse Roberts' opinion on remand, the ALJ will further address Plaintiff's step two impairments.

3. Develop the Record

Plaintiff argues that the ALJ erred by not obtaining intellectual testing results. ECF No. 14 at 5-7.

"In Social Security cases the ALJ has a special duty to fully and fairly

1 develop the record and to assure that the claimant's interests are considered."
2 *Smolen*, 80 F.3d at 1288 (citing *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.
3 1983). This duty is heightened when a claimant is unrepresented during the
4 administrative phase of his case. See *Widmark v. Barnhart*, 454 F.3d 1063, 1068-
5 69 (9th Cir. 2006) (where claimant is unrepresented "it is incumbent upon the ALJ
6 to scrupulously and conscientiously probe into, inquire of, and explore all the
7 relevant facts," as well as remain "especially diligent in ensuring that favorable as
8 well as unfavorable facts and circumstances are elicited"); *Tonapetyan v. Halter*,
9 242 F.3d 1144, 1150 (9th Cir. 2001) (ALJ has duty "to fully and fairly develop the
10 record and to assure that the claimant's rights are considered," and "must be
11 especially diligent in exploring for all the relevant facts" when claimant is not
12 represented).

13 Despite the ALJ's duty to develop the record, it remains the claimant's
14 burden to prove that he is disabled. 42 U.S.C. § 423(d)(5)(A); 20 C.F.R. §§
15 404.1512(a), 416.912(a). "An ALJ's duty to develop the record . . . is triggered
16 only when there is ambiguous evidence or when the record is inadequate to allow
17 for proper evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-60
18 (9th Cir. 2001); *Webb*, 433 F.3d at 687 ("The ALJ's duty to supplement a
19 claimant's record is triggered by ambiguous evidence, the ALJ's own finding that
20 the record is inadequate[,], or the ALJ's reliance on an expert's conclusion that the
21 evidence is ambiguous."). An ALJ may fulfill his duty to develop the record by
22 continuing the hearing, or keeping the record open after the hearing to allow
23 supplementation of the record. *Smolen*, 80 F.3d at 1288.

24 Here, Plaintiff was unrepresented at the hearing and there were diagnoses in
25 the record of learning disabilities based on Plaintiff's reported history. Tr. 308,
26 633. The ALJ found a learning disorder as a severe impairment at step two. Tr.
27 25. There is no intellectual testing in the record to support a finding of a learning
28 disorder. Considering the case is being remanded for the ALJ to further address

1 Plaintiff's mental health impairments and their resulting limitations, the ALJ is to
2 send Plaintiff for a consultative examination that includes intellectual testing and
3 call a psychological expert to testify at remand proceedings unless sufficient
4 evidence and opinions supplementing the record on this issue are otherwise entered
5 in evidence.

6 **4. Plaintiff's Symptom Statements**

7 Plaintiff contests the ALJ's determination that his symptom statements were
8 not entirely consistent with the evidence. ECF No. 14 at 18-21.

9 It is generally the province of the ALJ to make determinations regarding the
10 credibility of a claimant's symptom statements, *Andrews*, 53 F.3d at 1039, but the
11 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
12 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
13 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
14 and convincing." *Smolen*, 80 F.3d at 1281; *Lester*, 81 F.3d at 834. "General
15 findings are insufficient: rather the ALJ must identify what testimony is not
16 credible and what evidence undermines the claimant's complaints." *Lester*, 81
17 F.3d at 834.

18 The evaluation of a claimant's symptom statements and their resulting
19 limitations relies, in part, on the assessment of the medical evidence. *See* 20
20 C.F.R. §§ 404.1529(c), 416.929(c); S.S.R. 16-3p. Therefore, in light of the case
21 being remanded for the ALJ to readdress the medical source opinions in the file, a
22 new assessment of Plaintiff's subjective symptom statements will be necessary.

23 **REMEDY**

24 The decision whether to remand for further proceedings or reverse and
25 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
26 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
27 where "no useful purpose would be served by further administrative proceedings,
28 or where the record has been thoroughly developed," *Varney v. Secretary of Health*

1 & *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
2 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280
3 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
4 (noting that a district court may abuse its discretion not to remand for benefits
5 when all of these conditions are met). This policy is based on the “need to
6 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are
7 outstanding issues that must be resolved before a determination can be made, and it
8 is not clear from the record that the ALJ would be required to find a claimant
9 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
10 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
11 F.3d 1172, 1179-80 (9th Cir. 2000).

12 In this case, it is not clear from the record that the ALJ would be required to
13 find Plaintiff disabled if all the evidence were properly evaluated. Further
14 proceedings are necessary for the ALJ to determination if he has jurisdiction to
15 decide the DIB claim, to properly address the opinion evidence, to make a new
16 step two determination, to send Plaintiff for a consultative examination including
17 intellectual testing, and to determine the supportability of Plaintiff’s symptom
18 statements. The ALJ will also need to supplement the record with any outstanding
19 evidence and call a psychological and vocational expert to testify at remand
20 proceedings.

21 CONCLUSION

22 Accordingly, **IT IS ORDERED:**

- 23 1. Defendant’s Motion for Summary Judgment, **ECF No. 16**, is
24 **DENIED**.
- 25 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is
26 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
27 additional proceedings consistent with this Order.
- 28 3. Application for attorney fees may be filed by separate motion.

1 The District Court Executive is directed to file this Order and provide a copy
2 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
3 and the file shall be **CLOSED**.

4 **IT IS SO ORDERED.**

5 DATED July 2, 2018.



A handwritten signature in black ink, appearing to read "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE